ORAL ARGUMENT NOT YET SCHEDULED

No. 18-5122

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRISTOPHER J. CODE,
Plaintiff-Appellant,

v.

MARK T. ESPER, SECRETARY, U.S. DEPARTMENT OF THE ARMY,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE* MILITARY-VETERANS ADVOCACY IN SUPPORT OF APPELLANT SEEKING REVERSAL

John B. Wells
(Counsel of Record)
Military-Veterans
Advocacy, Inc.
PO Box 5235
Slidell, LA 70469-5235
Tel: 985-290-6940

Raymond J. Toney
Law Office of Raymond J. Toney
PO Box 3483,
Durango, CO 81302
Tel: 970-247-1384

Brian D. Schenk
Midwest Military & Veterans
Law, PLLC
310 4th Ave. S., Suite 5010
Minneapolis, MN 55407
Tel: 202-557-6570

Counsel for Amicus Curiae
Military-Veterans
Advocacy, Inc.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and Circuit Rule 26.1, Military Veterans Advocacy hereby declares that it is not a publicly-held corporation, does not issue stock, and does not have a parent corporation. Military Veterans Advocacy is an independent, not-for-profit corporation that advocates for the rights of military personnel and veterans through legal advocacy and public education.

TABLE OF AUTHORITIES

CASES

STATUTES AND LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Military-Veterans Advocacy Inc. (MVA) is a tax-exempt I.R.S. 501 (c)(3) organization based in Slidell, Louisiana, that works for the benefit of the armed forces and military veterans. Through litigation, legislation and education, MVA works to advance benefits for those who are serving or have served in the military. In support of this, MVA provides support for legislative efforts on the State and Federal levels as well as engaging in targeted litigation to assist those who have served. On May 22, 2019 this Court granted Military-Veterans Advocacy's motion to participate as *amicus curiae*.

Founded in 2012, MVA is deeply concerned that the boards for the correction of military records are unsuited to the often-times complex legal determinations they are called upon to make. The boards are described as "unique adjudicative mechanisms unlike traditional civil, criminal, or administrative courts."[2] They are poorly understood and infrequently

---

[1] In accordance with FRAP 29(a)(4)(E)(i),(ii) undersigned counsel states that no party's counsel authored the brief in whole or in part and no party or party's counsel contributed money that was intended to fund preparing or submitting the brief. However, counsel on this brief, Raymond J. Toney, has contributed money that was in intended to fund preparing or submitting the brief by paying for the printing and binding. *See* FRAP 29(a)(4)(E)(iii).

[2] Department of Defense, Report, National Defense Authorization Act 1996, Section 554(a), Review of System for the Correction of Military Records.

discussed yet their importance to service members and veterans is inestimable. The boards have decided tens of thousands of applications from military personnel and veterans alleging errors and injustices in the military records. Those applications have involved simple matters such as incorrect service dates or rates of pay to highly complex ones entailing the failure to diagnose and treat physical and psychiatric injuries, allegations of discrimination in all its varieties, whistleblower reprisal, the military's failure to obey statutes and regulations, and much more.

The boards for the correction of military records are also the primary source of potential redress for service members who have pursued other avenues of relief such as complaints to commanders, the inspectors general, military equal opportunity organizations, and a variety of informal and formal military boards. In many instances at stake are careers, reputations, promotions, retirements, and substantial sums of money. For many applicants the BCMRs are tribunals of first and last instance, as few pursue judicial review of adverse decisions. The BCMRs are the final military appeal for military administrative actions.

Amicus Military-Veterans Advocacy has been and remains engaged with practitioners and members of Congress concerning deficiencies in the boards' practices and procedures. Extensive legislative reforms were

introduced in the U.S. Senate as the *Legal Justice for Servicemembers Act*. *See* S. 1130, 114th Cong. (2015). More limited reforms were enacted into law. *See* 10 U.S.C. § 1552.

Investigations by non-governmental organizations, journalists, and practitioners also have raised grave concerns about the impartiality of the boards and the integrity of their decisional processes.[3] *Amicus* Military-Veterans Advocacy respectfully submits that the instant appeal is quite illustrative of the most fundamental problem faced by applicants to the correction boards—the full integration of the boards into the military departments. And that is to say the boards see their roles not as impartial adjudicators of claims of error and injustice, but as advocates for their respective department. What applicants most often face is an adversarial process whereby the correction boards make oppositional arguments under the guise of final decisions, and to which applicants have no meaningful opportunity to respond.

---

[3] *See, e.g.*, Rebecca Izzo, *In Need of Correction: How the Army Board for Correction of Military Records Is Failing Veterans with PTSD*, 123 Yale L.J. 1587 (2014); Raymond Toney, *The Legal Justice For Servicemembers Act*, JURIST – Professional Commentary (May 9, 2015); Human Rights Watch, *Booted: Lack of Recourse for Wrongfully Discharged U.S. Military Rape Survivors* 86-113 (2016); Alyssa Figueroa, *A Losing Battle: How The Army Denies Veterans Justice Without Anyone Knowing*, Fusion (2014), http://interactive.fusion.net/a-losing-battle/.

That is evident in LT Code's appeal. The ABCMR actively engaged in the process of devising and securing an advisory opinion from CID that then would be used to justify its desired outcome. CID did not offer an impartial review of LT Code's claims, even though it admitted his claims were meritorious. Rather, after prodding, it provided the ABCMR what the board wanted. Such a process is farcical if the expectation is that applicants' claims will receive fair and equitable treatment. In the opinion of *Amicus*, most often they do not.

Amicus Military-Veterans Advocacy is committed to securing fair and just treatment for those who are prepared to kill and die for the United States of America. LT Code did not receive such treatment.

RELEVANT FACTUAL BACKGROUND

On April 27, 2016, following the District Court's October 19, 2015 remand, the Army Review Boards Agency (ARBA) Legal Advisor, Joseph Masterson, authored a memorandum for record (MFR) recommending that the ABCMR obtain an advisory opinion from the Army Criminal Investigation Division (CID). Mr. Masterson questioned that Uniform Code of Military Justice Article 121 (Larceny) was a proper basis for the origin of LT Code's DFAS debt and recommended that the Board seek CID's opinion "as to how Code can be titled for larceny when no money or tangible property was taken."

Appx249. The legal advisor opined that LT Code "*obviously did not take (wrongfully or otherwise) any of those items. . . If Code is guilty*[4] *of anything, he would be guilty of unlawfully obtaining services*." Appx249 (emphasis added).

The ABCMR then requested an advisory opinion from CID. Therein, the ABCMR asked whether CID would have "pursued the same action against Mr. Code:" (a) If the applicant did not commit larceny but "stole" government services instead of government property? (b) If the applicant negligently, instead of criminally, obtained government services to which he was not entitled? (c) If the applicant had innocently obtained government services to which he was not entitled? *See* Appx313.

CID issued an initial advisory opinion on May 26, 2016, answering each question in the affirmative. Appx313. Regarding question (a), CID erroneously asserted that because the offense of larceny "covers both services and property synonymously" LT Code would have been investigated whether he "stole" government services rather than government property. Appx313.

---

[4] The ABCMR knows that "titling" and a finding of probable cause, even if properly made, do not establish guilt. *See* Department of Defense Instruction 5505.07, *Titling and Indexing in Criminal Investigations*, para. 6.5 (Feb. 28, 2018), notes that the "acts of titling and indexing are administrative procedures and *shall not connote any degree of guilt or innocence*." (emphasis added.)

LT Code responded to the advisory opinion on June 9, 2016. Appx307–11. His response asserted, in relevant part, that the advisory opinion had wrongly concluded the offense of larceny covered government services. Appx307. LT Code cited relevant provisions of the Manual for Courts-Martial, which expressly prohibits charging theft of services under UCMJ Article 121 but suggested that UCMJ Article 134 (Obtaining Services Under False Pretenses) was the applicable provision. Appx307.

Nonetheless, LT Code argued that because it was "legally impossible" for him to have committed larceny, no credible information existed that he had committed larceny, and his case met the standard for amendment of the report of investigation (ROI) under Army Regulation. Addressing the possibility that UCMJ Article 134 was applicable, LT Code argued, "because the CID never considered the elements [of UCMJ Article 134], it could not have reasonably concluded that credible evidence existed that Mr. Code committed an offense." Appx307.

After receiving LT Code's response but before formally requesting an advisory opinion from CID, Mr. Masterson began actively coordinating with CID on the contents of a supplemental advisory opinion. *See* Appx0246; Appx251. On August 30, 2016, LTC Vinton called Mr. Masterson and the two discussed the contents of the April 27, 2019 legal-review MFR and

"*whether the ROI should have referenced the UCMJ offense of obtaining services under false pretenses (Art. 134) instead of larceny (Art. 121)*." Appx246 (emphasis added). The legal advisor asked CID "to have the person writing the advisory opinion to address that issue as well." Appx. 246. The call concluded with a discussion of the fact that Mr. Masterson's MFR improperly had been sent to CID and whether or not CID had "received an actual advisory opinion request." Appx246.

The next day, a CID Group Judge Advocate—and evidently LTC Vinton's subordinate—Major Claudine Andola emailed Mr. Masterson, noting that she had reviewed the April 27, 2016 MFR "and was asked to respond to [Mr. Masterson's] inquiries." Appx247. She stated that she agreed with the Mr. Masterson's "assessment that *the titling and charging of larceny is not appropriate in this case*. *See* UCMJ, Section 46, Article 121, paragraph c(l)(g)(iv). *A more appropriate charge would be Article 134, obtaining services under false pretenses*." Appx247 (emphasis added).

One week later, the ABCMR formally requested a supplemental advisory opinion from CID. Appx251. The request was directed to MAJ Andola and solicited an opinion regarding the appropriate titling offense that was nearly identical to the opinion she had expressed in their previous email communications: "Is Article 121, Uniform Code of Military Justice (UCMJ)

(Larceny) the appropriate offense to title in this case? *Might Article 134, UCMJ (Obtaining services under false pretenses) be the more appropriate offense?*" Appx251 (emphasis added). The ABCMR's request stated that although the April 27, 2016 MFR was mistakenly forwarded to CID, they "may reference it if it assists your efforts." Appx251.

On September 13, 2016, LTC Vinton issued a supplemental advisory opinion to the ABCMR. Appx258. His opinion did not directly conclude whether UCMJ Article 134 was the appropriate titling offense. Rather, it opined that:

> As to the specific offenses in the case the Army Board for the Correction of Military Records is reviewing, there is no investigative procedural difference between larceny under Article 121, Uniform Code of Military Justice (UCMJ), or obtaining services under false pretenses under Article 134, UCMJ. Based on the dollar amounts in this situation, both offenses fall under USACIDC's investigative purview under the provisions of AR 195-2, table B-1, and either offense would be investigated and reported in the same manner.

Appx258.

Evidently not satisfied with the contents of LTC Vinton's supplemental advisory opinion, Mr. Masterson called MAJ Andola and, according to MAJ Andola, indicated he:

> [w]ould like [CID] to amend the advisory opinion to include a determination based on the facts presented of whether there is PC for larceny, or if the titling should have been obtaining services under false pretenses.

Appx262. MAJ Andola stated she would draft the amended opinion for LTC Vinton to sign. Appx262.

On September 28, 2016, LTC Vinton amended his September 13, 2016 supplemental advisory opinion to include language stating that Article 134 was a more appropriate titling offense:

> [N]ow having the benefit of reviewing the titling decision made more than five years ago, *it appears that there is no probable cause for Article 121, Larceny because there is no evidence to meet the required element of the taking of certain property*. . . . A more appropriate title and charge would be for the offense under Article 134, obtaining services under false pretenses.

Appx266 (emphasis added).

The ABCMR subsequently relied on this specific conclusion to grant what it incredulously deemed "partial relief." Appx141. The ABCMR decision stated that LT Code should have been titled under UCMJ Article 134 because he "was never accused of stealing tangible property." Appx141. The Board explicitly stated, "The CID advisory opinion supports this conclusion." Appx141. Based upon these findings, the Board directed corrections to LT Code's CID ROI that effectively re-titled him with an UCMJ Article 134 charge and granted no relief. The ABCMR record "corrections" provided no benefit to LT Code. They did not ameliorate his dire professional circumstances in any manner.

SUMMARY OF THE ARGUMENT

The District Court erred as a matter of law in holding that the ABCMR's decision was not arbitrary and capricious. Although Congress vested military correction boards with considerable equitable authority to correct errors or injustices in the records of servicemembers and veterans, the law only permits such boards to make corrections favorable to applicants. The ABCMR's decision to "re-title" LT Code years after the conclusion of CID's flawed titling decision plainly was not made to his favor and is therefore illegal. Further, the fact that the ABCMR's decision largely was based upon findings of an advisory opinion that ABCMR staff actively influenced evinces a disregard for the Board's intended role as an independent and fair venue for applicants seeking relief.

The repercussions of allowing the ABCMR to make corrections unfavorable to applicants and otherwise become extensions of the military staffs would be far reaching. The thousands of applicants who apply each year in good faith to military correction boards for innumerable reasons possibly would be exposing themselves to being placed in a worse financial, social, or professional position that before pursuing equitable remedies. For these reasons, the decisions of the ABCMR and the district court should be

reversed, and the case should be remanded with instructions that the lower court shall direct the Secretary of Army to rescind his unlawful decision.

ARGUMENT

1. The ABCMR lacked legal authority to "re-title" LT Code for the offense of obtaining services under false pretenses.

The military record correction boards enjoy an extraordinarily broad congressional grant of authority to correct military records. 10 U.S.C. § 1552(a)(1) states:

> The Secretary of a military department may correct *any military record of the Secretary's department* when the Secretary considers it necessary to correct an error or remove an injustice. (Emphasis added.)

Congress defined "military record" at Section 1552(f) as:

> [a] document or other record that pertains to (1) an individual member or former member of the armed forces, or (2) at the discretion of the Secretary of the military department concerned, any other military matter affecting a member or former member of the armed forces, an employee or former employee of that military department, or a dependent or current or former spouse of any such person.

The only substantive limitation on the boards' correction authority pertains to records of courts-martial. *See* id. § 1552(f).

LT Code's appeal before this Court is unique because it involves "corrective" actions taken *sua sponte* by the ABCMR that did not favor the applicant. Indeed, the records corrections made by the ABCMR were highly

prejudicial to LT Code and, if left uncorrected, will likely terminate his naval career. As we detail herein, the correction boards have never assumed to possess—nor have been deemed by courts to possess—legal authority to make record corrections unless such actions are favorable to applicants.

As this Court has stated, "The Correction Board can only exercise its discretion for the benefit of the individual member." *Wolfe v. Marsh*, 835 F.2d 354, 358 (D.C. Cir. 1987). *See also Doyle v. United States*, 599 F.2d 984, 311 (Ct. Cl. 1979) ("It should be kept in mind that 10 U.S.C. § 1552 grants to the Secretary, acting through correction boards, broad powers to correct and remedy errors and injustices. It is clear that the statute only confers on the Secretary power to correct records in favor or a serviceman and never against him."); *Rucker v. United States*, 702 F.2d 966, 973 n. 11 (11th Cir. 1983) (affirming *Doyle*).[5]

Should the Court affirm the decision of the ABCMR, the correction boards would be free to engage *sua sponte* in similar unfavorable actions in other cases, with potentially catastrophic consequences for applicants. LT

[5] In a 2014 interview with journalist Alyssa Figueroa, then-Acting Director of the ABCMR, Sarah Bercaw, stated that applicants have nothing to lose by petitioning the ABCMR, because "The worst thing we can do is say no." Figueroa, *supra*, at http://interactive.fusion.net/a-losing-battle/.

Code's appeal presents an outstanding opportunity for the Court to remind the boards of the strictly remedial nature of their authority and to reaffirm the highly prudent rule that corrections may only favor applicants.

A. The ABCMR may only grant favorable relief or deny relief.

The ABCMR decision in this case was contrary to law to because 10 U.S.C. § 1552 only authorizes the correction of records where the correction is favorable to the applicant. There is nothing in the language of Section 1552 or the pertinent Army regulations permitting the ABCMR to *sua sponte* change an applicant's military records in a manner unfavorable to the applicant. The extensive body of case law pertaining to the military record correction boards affirms the remedial nature of the boards, as does the dearth of judicial opinions concerning unfavorable *sua sponte* record corrections taken by the boards. The ABCMR's actions in this case were highly extraordinary.

10 U.S.C. § 1552(a)(1) authorizes the secretaries of the military departments, acting through the boards for the correction of military records, to correct the records of applicants when the secretaries "consider it necessary to correct an error or remove an injustice." Boards may recommend such corrections to the military secretaries only upon proper application by the

service member or veteran, or, in limited circumstances, upon request of the secretary concerned. *See id.* § 1552(b).

Section 1552(a)(3)(A) provides, "Corrections under this section shall be made under procedures established by the Secretary concerned." The Secretary of the Army has established procedures for the ABCMR at 32 C.F.R. § 581.3 and through promulgation of Army Regulation 15-185. Those regulatory provisions largely mirror one another.

32 C.F.R. § 581.3(c)(2)(i) provides: The ABCMR considers individual applications that are properly brought before it. In appropriate cases, it directs or recommends correction of military records *to remove an error or injustice*. (emphasis added).[6]

32 C.F.R. § 581.3(e)(3)(iii)(A)(1)-(2) further provides: Each application will be reviewed to determine -(A) Whether the preponderance of the evidence shows that an error or injustice exists and -*(1)* If so, *what relief is appropriate*. *(2)* If not, *deny relief*. (emphasis added).

The statute and regulations contemplate only actions to "remove an error or injustice" and to afford appropriate "relief," or to deny relief altogether. The option exercised by the ABCMR in LT Code's case—to make

---

6 *See also* Army Regulation 15-185, Para. 2-2(a).

corrections unfavorable to the applicant—was unauthorized. The ABCMR neither removed an error or injustice nor granted relief.[7]

The military record correction boards authority to make only favorable corrections derives from its remedial and equitable nature. *Oleson v. United States*, 172 Ct. Cl. 9, 18 (1965) ("The legislation is remedial and to be liberally construed, rather than narrowly or technically"). As this Court recently affirmed, the ABCMR has "an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief." *Haselwander v. McHugh*, 774 F.3d 990, 996 (D.C. Cir. 2014) (quoting *Caddington v. United States*, 178 F. Supp. 604, 607 (Ct. Cl. 1959)). The Board "is obligated not only to properly determine the nature of any error or injustice, but also to take 'such corrective action as will appropriately and fully erase such error or compensate such injustice.'" *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (citation omitted). "[W]hen a correction board fails to correct an injustice clearly presented in

[7] Black's Law Dictionary defines "relief" as, "The redress or benefit, esp. equitable in nature, (such as an injunction or specific performance), that a party asks of a court." Black's Law Dictionary (3d Pocket Ed. 1996).

the record before it, it is acting in violation of its mandate." *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975).[8]

In this case, LT Code petitioned the ABCMR in good faith and with the expectation that the Board would discharge its duties lawfully and fairly and either (1) find error and injustice and grant him the appropriate favorable relief or (2) fail to find error and injustice and deny the relief requested. Instead, the ABCMR assumed authority it did not have and took the rather Kafkaesque actions of altering the Report of Investigation prepared by CID to show that LT Code was "titled" for and that probable cause existed to believe LT Code violated a criminal offense under Uniform Code of Military Justice of which he was never accused and which CID had not previously considered or investigated.

B. The ABCMR made corrections unfavorable to LT Code.

The Army cannot plausibly argue that the ABCMR did not make record "corrections" unfavorable to LT Code. After determining that the CID records improperly titled him and erroneously found probable cause for larceny under Article 121 of the UCMJ, the ABCMR then altered the CID record to show that he was titled instead for a violation of Article 134, the unlawful taking of

[8] *Amicus* Military-Veterans Advocacy has found no judicial decisions asserting that the military record correction boards have legal authority to make corrections unfavorable to applicants.

government services, and that probable cause existed to believe he committed such an offense. Appx. 110. The ABCMR thus made two changes to the CID report: (1) it removed the UCMJ Article 120 specification, and (2) it replaced it with the UCMJ Article 134 specification, while leaving LT Code's name in the subject block. Substituting one criminal charge for another charge of equal seriousness was plainly unfavorable to LT Code. Indeed, the ABCMR admitted that fact:

> Given that the applicant was never accused of stealing tangible property, and was instead investigated for wrongfully obtaining the educational services of the Fort Buchanan school, it appears the applicant should have been titled under Article 134. The CID advisory opinion supports this conclusion. However, because both offenses imply roughly the same degree of culpability, *this change does not afford the applicant any relief relative to liability for the debt or to the amount of the debt*.

Appx.141 (emphasis added.)

Nor can the Army contend that its corrections were "neutral"—neither favorable nor unfavorable. As a result of the ABCMR's actions, LT Code's name remains in an extensive database (DCII) and is associated with the commission of a federal crime—now, the unlawful taking of government services. There is nothing neutral about that situation. And any argument that the corrections did not place LT Code in a worse position would be irrelevant and, indeed, entirely miss the point: if the correction is not favorable to the applicant, the Board cannot make it. Congress simply did not authorize the

correction boards to willy-nilly alter official military records. The question the Court should ask is not whether the ABCMR made LT Code worse off, but whether he is better off as a result of the corrections made. He clearly is not. If the correction does not provide an applicant relief, it is not favorable, and it is not permitted.

The Legal Advisor to the ABCMR and legal counsel for the CID both conceded that LT Code had been improperly titled and that the associated probable cause determination was invalid. Appx 247; 249. That is precisely what LT Code argued. Having conceded LT Code's position was correct, the only lawful option for the ABCMR to exercise was to grant the relief requested.

C. The ABCMR violated its fundamental role to remain independent and impartial by actively coordinating with an outside agency on the positions included in an advisory opinion it would later adopt.

The evidence of record clearly shows that the ABCMR abandoned any pretense of impartiality in this case. As the record makes clear, the ABCMR engaged in a sustained effort to procure and influence the contents of a CID advisory opinion upon which hinged the Board's *sua sponte* act to re-title LT Code under the guise of "partial relief." The ABCMR Legal Advisor and the CID worked hand-in-hand, ostensibly to find an alternative that might pass

muster before the district court—not an onerous task given the standard of review—even though both had conceded the validity of his claims.

As the U.S. Senate has noted, the military record correction boards:

> [a]re to be the honest broker, the forum for adjudication of claims from service members who allege errors in military records. *If these boards become extensions of the military staffs*, they will have lost their sole reason for existence.

S. Rep. No. 104-112, at 246 (1995) (emphasis added).

The House of Representatives has expressed its concurrence, noting:

> The committee is very sensitive to the many complaints from constituents about the timeliness of actions and perceived problems *concerning the independence and fairness of decisions by the boards for the correction of military records*. The committee views the boards as administrative arms of the Congress entrusted with the responsibility to be *the guarantors of fair and equitable treatment for thousands of active duty military members, veterans, and retirees*.

H.R. Rep. No. 105-532, at 300 (1998) (emphasis added).

The ABCMR's actions here were contrary to the clearly expressed Congressional intent that the correction boards should be honest brokers and the guarantors of fair and equitable treatment for our nation's servicemembers and veterans. And this is certainly not the first instance in which the integrity of the ABCMR's decisional processes have been called into doubt. *See*, *e.g.*, *Haselwander,* 774 F.3d 990; *Coburn v. McHugh*, 679 F.3d 924 (D.C. Cir. 2012); *Watson v. United States*, 113 Fed. Cl. 615 (2013); *Wilhelmus v. Geren*,

796 F.Supp.2d 157 (D.D.C. 2011); *Hill v. Geren*, 597 F.Supp. 23 (D.D.C. 2009).

Nor is it the first time the Board has collaborated in furtherance of CID's mission of data collection. In ABCMR docket number AR 2002072242 (April 10, 2003), the only case *Amicus* has identified in which the Board removed an applicant's name from the subject block of a CID report, the Board also *sua sponte* altered the CID record to show that the applicant was a witness. ADD007. Why did it take such action?

According to the Board:

> The Board does recognize the importance of maintaining comprehensive records that could assist law enforcement agencies in conducting future investigations, and it understands the general reluctance on the part of CIC [sic] officials to remove titling actions. Therefore, the Board finds that *it would be appropriate to address these concerns in this case by listing the applicant as a witness in the ROI in question*.
>
> Listing the applicant as a witness would result in no formal titling action that *would unfairly prejudice the applicant's professional development.* However, *it would still provide an audit trail* that would allow law enforcement officials access to information on the applicant's involvement in this particular investigation if that ever becomes necessary.

Id. (emphasis added).

In that case, as in LT Code's, the ABCMR seems to have misperceived its statutory purpose as being to assist the CID in its law enforcement function. Such bleeding of ABCMR authority is pernicious and contrary to the express

intent of Congress. Congress created the ABCMR to correct errors and injustices in military records, not to serve as a "super-command" that oversees and abets historical actions of the various Army missions and organizations. *Amicus* Military-Veterans Advocacy fears that the ABCMR has lost its way.[9] The Court now enjoys an opportunity to correct the Board's abuse of its legal authority.

D. Affirming the ABCMR's decision could have broad, negative consequences for servicemembers and veterans with errors or injustices in their records who must apply to the correction boards for relief.

Because the scope of the ABCMR's authority to correct military records was not fully briefed before the district court, it likely was not apparent to the court precisely what it was potentially authorizing by sustaining the ABCMR's decision in LT Code's case. The potential consequences are truly profound.

(1) Disability evaluation and medical retirement cases.

The military record correction boards adjudicate numerous applications concerning a service member's or a veteran's entitlement to medical

[9] Professional and academic commentaries have expressed similar concerns. *Supra*, n. 2.

retirement due to disability. To secure a medical retirement from the respective military department, an individual must receive a minimum disability rating of 30%. *See* 10 U.S.C. § 1201(b)(3)(B). A rating under 30% results not in medical retirement but in medical separation.

Commonly, applicants petition the correction boards to increase to or assign disability ratings to 30% to qualify for medical retirement. *See, e.g., Schmidt v. Spencer*, 319 F. Supp. 3d 386, 389–90 (D.C. Cir. 2018); *Barnick v. United States*, 591 F. 3d 1372, 1375, 1381–82 (Fed. Cir. 2010); *Quesada v. United States*, No. 17-1088C at 5 (Cl. Ct. Mar. 20, 2018). Those with a 30% disability rating or higher also commonly petition the correction boards to increase their disability ratings, often based on higher ratings assigned by the Department of Veterans Affairs. *See, e.g., Maneely v. Donley*, 967 F. Supp. 2d 393, 398 (D.D.C. 2013).[10]

---

[10] Military correction boards are required to make "[e]ach final decision" available "to the public in electronic form on a centralized Internet website." 10 U.S.C. § 1552(a)(5). Generally, decisions are published in online "reading rooms." *See* Boards of Review Reading Rooms, https://boards.law.af.mil (last visited May 31, 2019).

Access to prior decisions is vital to applicants and advocates primarily because boards are bound to follow prior precedent. *Wilhelmus*, 796 F. Supp. 2d at 162. In an effort to provide examples of the cases referenced herein, *amicus* counsel attempted to access the reading rooms but decisions are unavailable. Individuals may, however, request "specific decisional documents" should they know the precise docket number, which is uncommon in instances where one is searching for decisions covering a general topic area.

Should this Court endorse the ABCMR's actions in LT Code's case, the ABCMR would be free to correct applicants' records to reflect a reduction in their disability ratings. In the case of medically retired applicants seeking an increase to disability percentages, the ABCMR could correct applicants' records in such a manner as to cause them to lose their medical retirement eligibility. The ABCMR would simply need to decide, *sua sponte* or as it did here by prodding the Army for a supportive advisory opinion, that the Army erred and that the applicant was entitled to a disability rating of less than 30%. In such event the applicant would lose medical care for life for herself and her dependents, among other important monetary and non-monetary benefits.

(2) Medical diagnoses.

The correction boards also receive a significant number of applications in which individuals seek corrections to medical records, commonly contending that the military misdiagnosed a condition or failed to diagnose a condition. *See, e.g., Cowles v. McHugh*, No. 313-cv-1741 at (D. Conn. Sept. 30, 2014) (Applicant petitioned ABCMR for change of diagnosis from adjustment disorder to post-traumatic stress disorder "so that he could receive the benefits that he would have received had he been awarded them originally under section 1201.")

If the Court sustains the ABCMR decision, the Board would be free to "correct" medical records in a manner unfavorable to applicants, and contrary to the relief sought by applicants. For example, if a combat veteran seeks a correction to his records to show that he suffered post-traumatic stress disorder and that the condition was a contributing factor to misconduct leading to discharge, there would be no legal barrier to the ABCMR adopting an advisory opinion that contends—perhaps at the ABCMR's suggestion—that not only does the applicant not suffer from post-traumatic stress disorder, but that he suffers a personality disorder, adjustment disorder, or from some other non-compensable condition. The ABCMR could then "correct" the applicant's record to reflect the personality disorder or adjustment disorder diagnosis.

(3) Characterization of service "upgrade" requests.

A hearty perennial of the correction boards are requests for "upgrades" to service characterizations, which are awarded based on conduct and performance upon the separation of a member from active duty or upon the discharge of a member from the service.[11] Service characterizations impact

[11] *Amicus* Military-Veterans Advocacy intended to supply the Court with ABCMR decisions concerning discharge upgrades, but the website on which ABCMR decisions are published is at present inoperative.

civilian employment opportunities and affect eligibility for government benefits, including G.I. Bill educational benefits and VA benefits.

Service characterizations are governed by regulation and, with the exception of those awarded by court martial conviction, consist of: (1) Honorable; (2) General, Under Honorable Conditions; and (3) Under Other Than Honorable Conditions. *See generally* Department of Defense Instruction 1332.14, *Enlisted Administrative Separations*, Enclosure 4, Section 3 (Jan. 27, 2014). Applicants often contend that the service characterization they received was erroneous or unjust and request an "upgrade" from Under Other Than Honorable Conditions to either General, Under Honorable Conditions, or to Honorable. Common also are requests to "upgrade" discharges from General, Under Honorable Conditions to Honorable. *See, e.g.*, *Robinson v. Resor*, 469 F.2d 944 (D.C. Cir. 1972).

Should the Court sustain the ABCMR's decision in LT Code's case, the boards will be free not only to deny applications for service characterization "upgrades," but also to "downgrade" an applicant's service characterization. Again, the potential consequences of such actions to applicants are extraordinary and include loss of eligibility for VA compensation and other benefits. *See* 38 C.F.R. § 3.12.

(4) Sustaining the ABCMR's decision would have a chilling effect on potential applicants.

Should the Court sustain the ABCMR decision here, it will be necessary to advise applicants of the risk that the boards could make unfavorable corrections to the applicants' military records. Such advice would have to include the possibility that the correction boards could place applicants in a worse position as a consequence of a correction board application. The chilling effect such advice would have on potential correction board applicants is self-evident.

CONCLUSION

Based on the foregoing, the evidence of record, and the contentions on appeal of LT Code, *Amicus* Military-Veterans Advocacy respectfully submits that the decisions of the ABCMR and the district court be reversed and the matter remanded to the ABCMR with instructions to correct LT Code's record to grant full and proper relief.

/s/ John B. Wells
John B. Wells
(Counsel of Record)
Military-Veterans Advocacy, Inc.
PO Box 5235
Slidell, LA 70469-5235
Tel: 985-290-6940

/s/ Raymond J. Toney
Raymond J. Toney
Law Office of Raymond J. Toney
PO Box 3483,
Durango, CO 81302
Tel: 970-247-1384

/s/ Brian D. Schenk
Brian D. Schenk
Midwest Military & Veterans Law, PLLC
310 4th Ave. S., Suite 5010
Minneapolis, MN 55407
Tel: 202-557-6570

Counsel for Amicus Curiae Military-Veterans Advocacy, Inc.

June 3, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 5718 words, which is less than one-half the maximum length authorized by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ John B. Wells
John B. Wells

June 3, 2019

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2019, I filed a copy of the foregoing Brief *Amicus Curiae* with the Clerk of Court using the CM/ECF system, which will serve notice upon the following ECF registrants, and served a copy by first class mail on the following:

Nathan S. Mammen
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW Washington, DC 20004
(202) 389-5000

Jeremy Haugh, Assistant United States Attorney
555 Fourth Street, N.W.
Washington, D.C. 20530
(202) 252-2563

/s/ John B. Wells
John B. Wells

June 3, 2019

FED. R. APP. P. 28(F) ADDENDUM

PROCEEDINGS

IN THE CASE OF:

BOARD DATE: 10 April 2003
DOCKET NUMBER: AR2002072242

I certify that hereinafter is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in the case of the above-named individual.

	Mr. Carl W. S. Chun	Director
	Mr. Joseph A. Adriance	Analyst

The following members, a quorum, were present:

	Mr. Fred N. Eichorn	Chairperson
	Mr. Lester Echols	Member
	Ms. Marla J. Troup	Member

The applicant and counsel if any, did not appear before the Board.

The Board considered the following evidence:

Exhibit A - Application for correction of military records
Exhibit B - Military Personnel Records (including advisory opinion, if any)

FINDINGS:

1. The applicant has exhausted or the Board has waived the requirement for exhaustion of all administrative remedies afforded by existing law or regulations.

2. The applicant requests, in effect, removal of her name from the title block of Criminal Investigation Division (CID) investigation number (#) 97-CID112-59583, from the Defense Criminal Investigation Index (DCII), and from any other records reflecting the titling action.

3. The applicant states, in effect, that the only evidence against her that resulted in the titling action was the uncorroborated statements of an admitted and proven liar. She claims to have been titled in this case based solely on the uncorroborated statements of this individual, which has resulted in a serious injustice to her and the Army. She states that in August 1997, her accuser wrote a letter to the Provost Marshal Office (PMO), Absent Without Leave (AWOL) section, Fort Lewis, Washington, claiming that she sexually harassed and raped him on several occasions between 13 and 15 October 1996, when she was a drill sergeant at Aberdeen Proving Ground (APG), Maryland.

4. The applicant also claims that in September 1997, this individual who accused her of these offenses made a written sworn statement to the CID detailing how she allegedly indecently assaulted, forcibly sodomized, and raped him. In October 1997, he made two other sworn statements to this effect. However, in November 1997, he made a sworn statement that indicated that she had not indecently assaulted, forcibly sodomized, or raped him, but that she had engaged in consensual sexual intercourse and sodomy with him.

5. The applicant indicates that in December 1997, the APG CID office issued a final report of investigation (ROI), which listed her as the subject for adultery, indecent assault (unfounded), rape of an enlisted male (unfounded), sodomy, and violation of a general regulation by engaging in sexual intercourse and fellatio with a male private trainee. The ROI stated that the investigation determined that the private and she had engaged in consensual sexual intercourse. It further indicated that the investigation established that the offenses of rape and indecent assault did not occur as alleged by the private.

6. The applicant states that on 12 February 1998, subsequent to the original ROI being submitted, the Deputy Staff Judge Advocate (DSJA), APG, sent a memorandum to the APG CID office. In this memorandum, the DSJA opined that in light of information that she was not aware of when she rendered her first titling opinion, she now found that no probable cause existed to believe that the applicant committed the offenses of adultery, sodomy, and violation of a lawful order or regulation. This legal opinion was based on the fact that the individual alleging the offenses could not identify an obvious tattoo on the applicant's chest, despite repeatedly claiming that she took off her t-shirt and bra during intercourse and that he saw her breasts.

7. The applicant further states that on 13 February 1998, as a result of the change of opinion on the part of the DSJA, the APG CID office issued a final supplemental ROI. This report referenced the DSJA's legal opinion. However, the CID special agent in charge still found that credible information existed to believe the applicant committed the offenses of adultery, sodomy, and violation of a general order or regulation. Consequently, no change was made to the title section of the CID report.

8. The applicant states that on 25 August 2000, after having requested and obtained a redacted copy of the ROI, she made a written request to Director, Army Crime Records Center, Criminal Investigation Command (CIC), to have all titling determinations against her removed. In mid November 2001, she received a response to this request. It stated that as a result of her request, the APG CID office issued a final supplemental ROI, which was amended to read that there was insufficient evidence to establish that she had committed the offenses of adultery, sodomy, and violation of a general regulation. However, the report still stated that the investigation established that the male private and the applicant had engaged in consensual sexual intercourse. Further, the report still listed her as a subject for adultery (insufficient evidence), indecent assault (unfounded), rape of an enlisted male (unfounded), sodomy (insufficient evidence), and violation of a lawful order or regulation (insufficient evidence).

9. The applicant's military records show that she is currently on active duty, holds the rank of sergeant first class/E-7, and at the time of her application was serving in Korea.

10. On October 1997, a male private trainee alleged that the applicant, his former drill sergeant, had indecently assaulted him, forced him to engage in sodomy, and raped him on several occasions while he was assigned as an initial entry training (IET) soldier at APG. As a result of these allegations, the applicant was made the subject of an investigation conducted by CID officials at APG.

11. The offenses for which the applicant was investigated were adultery, indecent assault, rape, sodomy, and violation of a lawful order or regulation. The investigation established probable cause to believe the applicant had committed the offenses of adultery, sodomy, and violation of a lawful order or regulation. However, it found the charges of rape and indecent assault were unfounded.

12. On 12 February 1998, the Deputy Staff Judge Advocate (DSJA), APG, prepared a memorandum for record, in which she indicated that upon review of the final report in the applicant's case, she no longer agreed with her original opinion reference the decision to title the applicant. She commented that the titling decision was inconsistent with the information in the report. She further claimed that the final report revealed information she was not aware of at the time she gave her original opinion. The final report contained information that the applicant had a rather large, very distinguishable tattoo above her left breast that is visible even without the removal of her bra, and a large tattoo over her left shoulder.

13. The DSJA further indicated that the male private alleged that he did not see any unusual marks, tattoos, or scars on the applicant body during their alleged sexual intercourse episodes in her office. He claimed it was too dark in her office to see anything. However, CID agents conducted a light level analysis of the room. This revealed that even with the curtains drawn, enough light entered the room to allow them to see and distinguish colors at various distances within the room at the time of day the male private alleged these incidents took place. Based on this analysis, the private's claim that he could not see anything because it was too dark is implausible in light of his statement that the applicant removed all of her clothing and that is was 1300 hours when these sexual encounters allegedly occurred. Thus, the DSJA commented that it was her belief that the accuser could not tell CID about any distinguishing marks or tattoos on the applicant's body because he never actually saw her unclothed as he claimed. Finally, the DSJA stated that based on the foregoing evidence, she no longer opined that there was sufficient credible evidence to support the decision to title the applicant.

14. On 13 February 1998, a supplemental ROI was submitted that indicated that the investigation had established that there was probable cause to believe the applicant had committed the offenses of adultery, sodomy, and violations of a lawful order or general regulation, when she engaged in consensual sexual intercourse and fellatio with a male private who was attending IET. It further established that the offenses of rape and indecent assault did not occur as alleged by the male private. This supplemental ROI also included a reference to the change of the DSJA opinion in the case, who now believed that there was not sufficient probable cause to believe that the applicant committed the offenses of adultery, sodomy, or violation of a lawful order or regulation.

15. On 10 October 2002, further investigation resulted in establishing that there was insufficient evidence to establish that the applicant had committed the offenses of adultery, sodomy, and violation of a lawful order or regulation when she allegedly engaged in consensual sexual intercourse and fellatio with the male private initial entry trainee. Further, it stipulated that the offenses of rape and indecent assault did not occur and were unfounded. However, the applicant was still listed as the subject of an investigation for adultery (insufficient evidence), indecent assault (unfounded), rape of an enlisted male (unfounded), sodomy (insufficient evidence), and violation of a lawful order or regulation (insufficient evidence).

16. In connection with the processing of this case, all CID and military police reports (MPR) on file for the applicant were requested and provided by the Director, Crime Records Center, U.S. Army Criminal Investigation Command (CIC), Fort Belvoir, Virginia, dated 26 June 2002. The response to this records request indicated that she requested amendment of the ROI through the CIC. As a result, a final supplemental report was published on 10 October 2001, which changed the determination on the adultery, sodomy, and violation of a lawful order or regulation to insufficient evidence, and the remaining offenses to unfounded. It further indicated that the applicant had not requested an amendment to the MPR.

17. In addition, a member of the Board staff requested an advisory opinion from the CIC, asking for an evaluation of the applicant's request for removal of the titling action. The CIC provided an advisory opinion, dated 28 August 2002, that was prepared by a CIC Assistant Staff Judge Advocate (ASJA), a captain. The ASJA stated that CIC found the administrative action for removal of the titling action in the applicant's case is not appropriate. He also stated that the original titling determination in this case was based on the standard outlined in Department of Defense Instructions (DODI) 5505.7, as well as current DOD Inspector General (IG) guidance, which states that names of individuals shall only be removed from the title block of a ROI in cases of mistaken identity, or when, based on all available information, there was no evidence to believe that a criminal offense occurred at the time of the initial titling determination. He opines that neither of these situations apply in this case, and at the time the applicant was titled there was indeed credible evidence to believe that she may have committed the criminal offenses for which she was titled.

18. The CIC opinion further states that the subsequent supplemental report characterizing the offenses of adultery, sodomy, and violation of a general order or regulation as having "insufficient evidence" does not warrant removal of the applicant's name from the title block of the original ROI. He contends that the analysis required to determine a subsequent characterization of the titled offenses is separate and distinct from the analysis made at the time of the original titling determination, and involves a different evidentiary threshold.

19. The applicant was provided a copy of the CIC advisory opinion in order to have the opportunity to rebut or response to its contents. To date, she has failed to reply.

20. Department of Defense Instructions (DODI) 5505.7 contains the authority and criteria for titling decisions. It states, in pertinent part, that titling only requires credible information that an offense may have been committed. It further indicates that regardless of the characterization of the offense as founded, unfounded, or insufficient evidence, the only way to administratively remove a titling action from the Defense Central Investigations Index (DCII) is to show either mistaken identity or a complete lack of credible evidence to dispute the initial titling determination.

CONCLUSIONS:

1. The Board notes the applicant's claim that her name should be removed from the title block of CID investigation number # 97-CID112-59583, from the DCII, and from any other records reflecting the titling action, based on the lack of evidence to show she committed any offenses, and it finds her claim has merit.

2. DoD policy specifies that titling only requires credible information that an offense may have been committed. It further indicates that the only way to administratively remove a titling action from the DCII is to show either mistaken identity or a complete lack of credible evidence to dispute the initial titling determination.

3. The Board understands the basis on which CID officials made their initial titling decisions pertaining to the applicant. However, it does not concur with the conclusion of the CIC advisory opinion, which indicates that at the time of the original titling action, there was credible evidence to believe that the applicant may have committed the offenses for which she was titled.

4. In the opinion of the Board, there is more than a sufficient evidentiary basis to conclude that there was a complete lack of credible evidence to support the initial titling determination. The evidence of record in this case confirms that the titling action on the applicant was based solely on the unsubstantiated statements of the male private who accused her of these offenses. These statements are not now nor were they ever corroborated by any other source or by information obtained during the investigation conducted by the CID.

5. In addition, the Board finds the credibility of the accuser in this case to be highly questionable, considering he was titled for false swearing based on false sworn statements he made during the course of the investigation in question, and was ultimately declared a deserter from the Army.

6. The Boards finds the lack of credibility of the primary accuser, coupled with the statement of the DSJA involved in the original titling action, which indicates that the decision to title the applicant was inconsistent with the evidence and information contained in the original ROI, is more than sufficient to conclude that there is a complete lack of any credible evidence to support the original decision to title the applicant.

7. In view of the facts of this case, the Board concludes it would be appropriate to remove the applicant from the title block of the investigation in question, and to remove her name from DCII and all other criminal records systems that were updated based on this ROI.

8. Notwithstanding the fact that the supplemental reports cleared the applicant of the offenses for which she was originally titled, the initial titling action could still unfairly deny the applicant the opportunity to compete for nominative assignments or positions, and unjustly inhibit her military career progression. Thus, the Board finds it necessary to take this action in the interest of justice and equity.

9. The Board does recognize the importance of maintaining comprehensive records that could assist law enforcement agencies in conducting future investigations, and it understands the general reluctance on the part of CIC officials to remove titling actions. Therefore, the Board finds that it would be appropriate to address these concerns in this case by listing the applicant as a witness in the ROI in question.

10. Listing the applicant as a witness would result in no formal titling action that would unfairly prejudice the applicant's professional development. However, it would still provide an audit trail that would allow law enforcement officials access to information on the applicant's involvement in this particular investigation if that ever becomes necessary.

11. In view of the foregoing, the applicant's records should be corrected as recommended below.

RECOMMENDATION:

That all of the Department of the Army records related to this case be corrected by removing the name of the individual concerned from the title block of Criminal Investigation Division (CID) investigation number 97-CID112-59583, from the Defense Criminal Investigation Index (DCII), and from any other records reflecting the titling action; and by instead listing her as a witness in the report of investigation in question.

BOARD VOTE:

___fe___ ___mt___ ___fe___ GRANT AS STATED IN RECOMMENDATION

_____ _____ _____ GRANT FORMAL HEARING

_____ _____ _____ DENY APPLICATION

Fred N. Eichorn
CHAIRPERSON

INDEX

CASE ID		AR2002072242
SUFFIX		
RECON		
DATE BOARDED		2003/04/10
TYPE OF DISCHARGE		N/A
DATE OF DISCHARGE		N/A
DISCHARGE AUTHORITY		N/A
DISCHARGE REASON		N/A
BOARD DECISION		GRANT
REVIEW AUTHORITY		
ISSUES	1. 267	123.0700
	2.	
	3.	
	4.	
	5.	
	6.	